

EXHIBIT 6

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHASOM BROWN, WILLIAM BYALL,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE
TRUJILLO individually and on
behalf of all other similarly No.
situated, 5:20-cv-03664-LHK-SVK

Plaintiff,

vs.

GOOGLE LLC,

Defendant.

_____/

VIDEO-RECORDED DEPOSITION OF JEREMY DAVIS
REMOTE ZOOM PROCEEDING
Little Rock, Arkansas
Friday, January 7, 2022

REPORTED BY:

LESLIE ROCKWOOD ROSAS, RPR, CSR 3462

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Job No. 5019103

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1 Yes, I would say this is familiar to me as that
2 splash screen or that incognito new tab screen, however
3 we're referring to it.

4 Q. And is this something that -- a screen that you
5 see whenever you open a new tab in incognito mode? 10:26:27

6 A. Yes, that's correct.

7 Q. And so I want to ask you about some of the
8 statements here.

9 Do you have any understanding, just in terms of
10 plain English, of what the word "incognito" means? 10:27:02

11 A. Sure. As I understand it -- I haven't gone and
12 referenced the dictionary or anything, but as I -- I
13 think in general, you know, parlance and understanding,
14 people understand incognito to mean concealed, anonymous,
15 unidentifiable. 10:27:27

16 Q. And how about this first sentence here, "Now you
17 can browse privately, and other people who use this
18 device won't see your activity."

19 What is your understanding of that sentence?

20 A. Sure. When I read the words, "Now you can 10:27:55
21 browse privately," comma, "and other people who use this
22 device won't see your activity," that first sentence, I
23 understand that to be two statements.

24 I'm being told now by Google in incognito mode
25 in Chrome, that I can browse privately and other people 10:28:18

1 who use this device won't see my activity.

2 That's how I interpret that sentence.

3 Q. And is that how you've always interpreted that
4 sentence?

5 A. Yes.

10:28:37

6 Q. And I noticed when you read it out loud, you --
7 you said the word "comma." So is the comma important to
8 your understanding of that sentence?

9 A. Yes. So -- so in English grammar, comma denotes
10 separation of idea. And so -- at least that's how I
11 understand it.

10:29:01

12 So I understand, like I said, if it was "and,"
13 then that conjuncts or brings those things together as a
14 single statement. But the comma, I believe, makes those
15 separate statements.

10:29:17

16 So I can browse -- I can browse privately, and
17 people who use this device won't see my activity.

18 Q. So if the comma were not in that sentence, in
19 what way would your understanding of the sentence be
20 different?

10:29:34

21 MR. LEE: Objection to form.

22 THE WITNESS: I would still understand the
23 assertion of browsing privately, and then I would also
24 still understand that if I use incognito mode, that
25 people won't be able to see my activity on that device.

10:29:49

1 Q. BY MR. SCHAPIRO: So you would understand it the
2 same without the comma?

3 A. Overall, I would say yes.

4 Q. And what do you understand browse privately to
5 mean? 10:30:08

6 A. Sure. Browsing privately denotes, obviously,
7 privacy from peering eyes. Like even the -- the icon at
8 the top of the page gives you some indication of
9 anonymity; right? And unidentifiability; right?

10 So I can also read the rest of the words that 10:30:39
11 are on the screen with regard to what Google or Chrome
12 won't say or collect, which is browsing history, cookies
13 and side data and information entered in forms.

14 So I understand that the activity that I'm
15 engaging in inside that browser session, because I've 10:31:02
16 explicitly gone into incognito mode to be private, as the
17 words on the screen say.

18 Q. So I asked you a little about -- about
19 privately. How about the second part of that sentence?

20 Is it -- are you contending in -- in this lawsuit that 10:31:18
21 the second part of that sentence -- well, strike that.

22 It's fair to say, right, that one of the reasons
23 you're here is because you believe that when you were in
24 incognito, you -- you weren't actually browsing
25 privately, at least as you understood or expected it; 10:31:45

1 correct?

2 A. That's -- that's correct. I understand from the
3 Google Terms of Service, which relay me to the Google
4 Privacy Policy, which I reviewed, that those words in the
5 private policy, that I will be in control of my 10:32:07
6 information and that I can browse privately using Chrome
7 in incognito mode. And that would cover across Google's
8 services.

9 And so it's my understanding that without my
10 consent, Google actually did collect that information, 10:32:21
11 even though the materials say that they won't when I'm in
12 incognito mode.

13 Q. Let me ask you about the second part of that
14 sentence. You're not contending that in incognito mode
15 other people who used your device were able to see your 10:32:47
16 activity, are you?

17 A. No, that part is clear to me.

18 Q. And you're not contending that that did not
19 occur; correct?

20 MR. LEE: Objection to form. 10:33:05

21 MR. SCHAPIRO: Yeah, it's a double negative.
22 Let me rephrase the question.

23 Q. You were contending that Google did various
24 things that -- that you say were -- were not what Google
25 said it was going to do. But that doesn't apply to the 10:33:19

1 were incognito and, contrary to this statement, someone
2 else who was using your device was able to go and see
3 what you had been doing incognito. That's not one of
4 your claims in this suit, is it?

5 A. No, that's not a claim that I'm making. 10:35:07

6 Q. And I assume you're not contending there's
7 anything inaccurate about the next sentence, that
8 downloads and bookmarks will be saved, are you?

9 A. No, I take Google at their word on that.

10 Q. Do you know -- 10:35:20

11 A. And that's my understanding -- that's my
12 understanding of how that works, right.

13 Q. Do you recall if you've ever clicked on the
14 "learn more" phrase that follows that sentence?

15 A. I don't have specific recollection of that. 10:35:42

16 It's entirely possible that I did at some point, but I
17 don't have specific recollection of that.

18 Q. All right. What is your understanding of what
19 Chrome is?

20 A. What Chrome is. Yes, in layman's terms, I would 10:36:03
21 say that Chrome is understood to be a web browser
22 application that is supported on many different platforms
23 and devices. And users use that to interact with the
24 internet, specifically the web.

25 Yeah, it's a modern web browser, Chrome is. 10:36:23

1 Q. And do you know what company created Chrome?

2 A. I know it's branded and marketed by Google. I
3 don't know if it's correct to call them Google or
4 Alphabet or which company is the legal entity or owner of
5 it, but I understand Google to produce and support 10:36:49
6 Chrome.

7 Q. So it's fair to say that Google is the company,
8 Chrome is -- Chrome is Google's browser?

9 A. It's their product or service, however they
10 refer to it, that's right. 10:37:00

11 Q. And so in that next sentence on the splash
12 screen, "Chrome," which you've just defined as the
13 browser, "won't save the following information," when
14 you're incognito. That last part was my words. Colon.
15 And do you see where it says, "Your browsing history"? 10:37:22

16 Do you see that?

17 A. I see that section, yes.

18 Q. Is it your contention here that Chrome, the
19 browser, when you were incognito actually did save your
20 browsing history? 10:37:37

21 A. I would say Chrome would be the thing that
22 relays back to Google my browsing history, right.

23 So when I read "Chrome" there, I don't separate
24 Chrome. There may be some distinction you're trying to
25 make, but Chrome and/or Google are essentially the same 10:38:00

1 business partners?

2 A. I guess my expectation is not as relevant as
3 what the companies are doing; right? I've seen both
4 examples to your example. I've seen where some companies
5 exhaustively list -- or list off the partners that they 11:23:25
6 sell to or they may just make a blanket claim. And then
7 I think it's up to the individual to interpret whether or
8 not they perceive that as an acceptable term to them.

9 Q. Are you familiar with the website CoinMarketCap?

10 A. I am, yes. 11:23:47

11 Q. And that's one of the websites that -- in some
12 of the submissions in this case, you indicated that's --
13 that's one that you visit regularly; is that correct?

14 A. That's correct.

15 Q. Have you read the Privacy Policy of 11:24:07
16 CoinMarketCap.com?

17 A. I believe I may have reviewed it at some point,
18 but I don't have specific recollection of when.

19 MR. SCHAPIRO: Let's load it up as an exhibit.

20 This will now be Exhibit 4. 11:24:35

21 (Exhibit 4, CoinMarketCap Privacy and Cookie
22 Policy, marked for identification electronically
23 by counsel.)

24 MR. LEE: Andy, while we wait for the Exhibit

25 Share to load, do you have an effective date for the 11:24:46

1 Exhibit 4?

2 MR. SCHAPIRO: Not off the top of my head.

3 Let's see if one is indicated here.

4 Effective date is January 1st, 2020.

5 MR. LEE: Thank you.

11:25:15

6 THE WITNESS: Okay. I have that document.

7 Q. BY MR. SCHAPIRO: Okay. And if you take a look

8 at this first page here, do you see the large heading

9 "What Information Do We Collect?"

10 A. I see that section.

11:25:30

11 Q. And by the way, do you remember one way or

12 another whether you've ever looked at the CoinMarketCap

13 Privacy Policy?

14 MR. LEE: Are you asking if he's seen this one?

15 Q. BY MR. SCHAPIRO: Well, let me ask first more

11:25:47

16 generally.

17 Any version of it?

18 A. Yes, this is familiar to me in terms of I recall

19 there being a Privacy Policy for CoinMarketCap. And this

20 is generally familiar. I, of course, can't tell you if I

11:26:02

21 looked at this exact version.

22 Q. All right. And do you see here under "What

23 Information Do We Collect?" CoinMarket states that they

24 correct -- and I'm looking down at letter E, quote,

25 "Information related to your use of the website and/or

11:26:19

1 the mobile application, including IP address, geographic
2 location, and date and time of your request"?

3 Do you see that?

4 A. Yes, I see that.

5 Q. And do you have any objection to CoinMarketCap 11:26:35
6 collecting that data?

7 A. As they're disclosing it, obviously no. It
8 seems that they're disclosing this because it's necessary
9 for the functionality of their site and service.

10 Q. And would it be objectionable to you if they 11:27:01
11 were, rather than collecting it themselves, sharing the
12 data with some other companies?

13 A. If they do not disclose that they are selling or
14 sharing that information, yes.

15 Q. Let's take a look at page 3 under the section 11:27:15
16 entitled "Cookies and Web Beacons."

17 Let me know when you see that.

18 A. Okay. I see that section.

19 Q. And you'll see that it indicates here -- this is
20 towards the end of the very first paragraph, 11:27:48
21 "CoinMarketCap and its ad management partners ('Ad
22 Partners') use cookies to record current session
23 information. Our ad partners may also from time to time
24 use web beacons (also known as internet tags, pixel tags,
25 and clear GIFs). These web beacons are provided by our 11:28:20

1 ad partners and allow ad partners to obtain information
2 such as the IP address of the computer that downloaded
3 the page on which the beacon appears, the URL of the page
4 on which the beacon appears, the time that the page
5 containing the beacon was viewed, the type of browser 11:28:45
6 used to view the page, and the information in cookies set
7 by the ad partners."

8 And then at the very end, it says -- of that
9 paragraph, it says, "You can opt-out of Google Analytics'
10 data collection with the Google Analytics opt-out browser 11:29:10
11 add-on."

12 Did I read that correctly?

13 A. I followed along as you read it. (Nods head.)

14 Q. And so when -- if and when you read this
15 website's Privacy Policy, you would have been aware that 11:29:34
16 Google is receiving your data when you visit the
17 CoinMarketCap website; correct?

18 MR. LEE: Objection to form.

19 THE WITNESS: No. I actually have no specific
20 recollection of the verbiage that we just read. I don't 11:29:49
21 have any recollection of reading that.

22 Q. BY MR. SCHAPIRO: Well, I'm not asking
23 necessarily if you have a recollection of it. I'm asking
24 if -- if you had read that, it would have told you there,
25 right in black and white, correct, that Google is 11:30:07

1 receiving your data when you visit the website; right?

2 MR. LEE: Are you saying in incognito mode or
3 not in incognito mode?

4 Q. BY MR. SCHAPIRO: You may answer.

5 A. I would have the same, you know, question as to 11:30:25
6 whether or not the behavior would be expected in
7 incognito mode, which is the question in this case.

8 But I can tell you that I didn't -- prior to
9 becoming involved in this case and the claims of the
10 materials on Google Analytics, I was not aware of this 11:30:50
11 opt-out browser add-on.

12 Q. Do you know if you ever clicked on a link --
13 here you see it says, "Google Analytics opt-out browser
14 add-on." It's in blue. I'll represent that there's a
15 link to that. 11:31:19

16 Do you recall ever clicking on a link about the
17 Google Analytics opt-out browser add-on?

18 A. I do not. My first -- again, my first exposure
19 to this was in documentation in review of this case.
20 Prior to that, I was not aware of this opt-out plug-in. 11:31:34

21 Q. Let's introduce -- let's take a look at what --
22 of what you would find if you click that link. This will
23 be Exhibit Number 5.

24 (Exhibit 5, Google Analytics Opt-out Browser
25 Add-on, marked for identification electronically 11:31:53

1 IP log might get generated through that exchange.

2 Q. BY MR. SCHAPIRO: And you referred to profiles.

3 You said, "The concern is primarily that those profiles

4 that are being built about individual user activity,

5 especially when that activity is happening in incognito 11:47:04

6 mode, which Google has asserted is a private activity,

7 runs counter to logic."

8 What are you referring to there when you talk

9 about profiles that are being built?

10 A. Sure. I consider Google to be a sophisticated 11:47:24

11 and very complex operator and the most powerful

12 aggregator of identity information on the planet; right?

13 I've seen numerous articles of what their capability is

14 to monetize personas and profiles. And it's their

15 business model. 11:47:48

16 And so if even anonymized personas are built

17 while in incognito mode, I have high expectations that

18 that could be correlated back to things like my

19 infrequently changing IP address. That might also be

20 based on the known entity Jeremy Davis when I log in with 11:48:14

21 my Gmail account from that same address. My concern is

22 that there's an assertion of privacy where there may not

23 be in incognito.

24 So when I talk about those profiles, the

25 collection of that data by Google in, quote/unquote, 11:48:31

1 "anonymized fashion," I believe it's a reasonable
2 perspective to assume that if that is actually being
3 collected when I was told that they were not, that erodes
4 my trust in whether or not Google may be leveraging that
5 anonymized persona in a way that perhaps they shouldn't. 11:49:00

6 And so it's a trust erosion perspective to know
7 that tracking activities that I was told I was in control
8 of and that I didn't consent to occurred while I was in
9 incognito mode.

10 Q. Do you have any basis to believe that any such 11:49:30
11 profile has ever been made based on -- based on your
12 incognito browsing activity?

13 A. I believe Google has disclosed the fact that for
14 any logged-in user that's an identity that they know. I
15 also am aware through the disclosures through this case, 11:49:59
16 and/or -- and I may not use that -- that may not be the
17 correct word, but the materials presented in the case,
18 that these anonymized profiles exist.

19 And so I would contend that if information is
20 being collected during incognito sessions, I doubt 11:50:21
21 seriously that Google would do that if there was no value
22 in that; right?

23 And so if the effort is being made to collect
24 that information when I thought it was not being
25 collected, this -- this challenges the notion of the 11:50:43

1 advertisement.

2 Q. So my question, nevertheless, is: You said when
3 you saw this, I'll just say a story about this lawsuit,
4 it piqued your interest. And I was asking prior to that
5 point, had you ever seen any articles or blog posts, 12:32:53
6 presumably not from Google, suggesting -- causing you to
7 suspect or suggesting that incognito might not be private
8 in the way you had thought?

9 A. Fairly recently, prior to the case, I believe
10 there was a journal entry or a hypothetical post that 12:33:19
11 said it was hypothetically possible that Google could be
12 aggregating information. I think there was an article
13 written about that. And I even think I recall reading
14 Google responding to that article and saying that they --
15 perhaps that they did not. 12:33:42

16 And so that's my recollection of any materials
17 that might have indicated that maybe things were not as
18 they appear with regard to incognito.

19 Q. And do you remember about how long before the
20 lawsuit that was? 12:34:04

21 A. I'm pretty sure it was within a year. Like, it
22 was less than a year.

23 Q. And then since filing the lawsuit, I believe you
24 told us earlier that you continued to use Chrome because
25 you didn't want to change your -- your activity. Am I 12:34:35

1 characterizing that right?

2 A. Yeah. I thought it would be best to be
3 consistent with my activity during the course of the
4 lawsuit.

5 Q. While you're continuing to use Chrome, have you 12:34:52
6 taken any -- have you taken any steps to -- to prevent
7 what you contend is the improper collection of your
8 information?

9 A. Again, I'll restate. I haven't changed my
10 behavior. I've kept my behavior consistent since the 12:35:17
11 lawsuit started.

12 Q. And by that, I assume that means including the
13 things like extensions, add-ons, settings, et cetera?

14 A. Yeah, I have not taken additional action or
15 leveraged any of those capabilities. If you're -- if 12:35:34
16 you're specifically asking me, like, have I installed the
17 ad blocker or the ad -- extension add-on, the answer is
18 no. I have not made use of those things you mentioned
19 earlier in the call.

20 Q. Mr. Davis, do you believe that you entered into 12:36:01
21 a contract with Google?

22 A. The answer is yes. And not only do I believe
23 that, I believe the Court has affirmed that a contract
24 exists. Not excluding -- not exclusive to, but I believe
25 including the splash screen, the Google Terms of Service 12:36:23

1 provide anything to Google in return to the use of
2 Chrome?

3 A. Of course. I provided my activity and data;
4 right? Clearly that -- there is value to the data
5 provided. And that is -- that is the -- that is the 12:38:37
6 exchange of the parties in that contract; right?

7 Q. So you agreed to provide data to Google?

8 A. In normal -- in normal browsing mode. Nowhere
9 in the Terms of Service, the Google Privacy Policy or the
10 splash screen did it provide me an opportunity to consent 12:39:03
11 to the exchange of data while in incognito mode.

12 Again, Google tells me I can browse privately.
13 I have no expectation of exchange of data when in
14 incognito mode.

15 Q. Can you take a look at paragraph 275 of the 12:39:20
16 Complaint, the Second Amended Complaint?

17 A. Sure. Let me just turn to it. You said 275?

18 Q. Yes, sir.

19 A. It's almost to the end. Let's see. Okay. I
20 have it in front of me. 12:40:03

21 Q. Do you see where it says, "Plaintiffs and class
22 members also did not receive the benefit of the bargain
23 for which they contracted and for which they paid
24 valuable consideration in the form of the personal
25 information they agreed to share, which has ascertainable 12:40:20

1 Q. Yes. Exhibit 12, yeah.

2 A. -- Exhibit 12?

3 MR. LEE: You have a paper copy, too.

4 Q. BY MR. SCHAPIRO: Yeah, if you have a paper

5 copy, you can look at it as well. 12:55:18

6 A. Yeah. The paper copy I have has section numbers
7 on it. And this one --

8 MR. LEE: No.

9 THE WITNESS: Oh, sorry. No, it's the Privacy

10 Policy. Excuse me. 12:55:30

11 Yeah, just one second.

12 Yeah, I can call out the specific language in
13 the Privacy Policy.

14 So at the end of the first sentence, there are

15 the words "Put you in control"; right? So I understand, 12:55:47

16 through Google's Privacy Policy, that I am in control;

17 right?

18 Q. BY MR. SCHAPIRO: Do you believe that --

19 MR. LEE: Wait. Were you done with your answer?

20 Excuse me. Excuse me. I'm not sure he was 12:56:06

21 done. I just want to confirm.

22 THE WITNESS: No, I wasn't. I wasn't.

23 MR. LEE: Why don't you finish.

24 THE WITNESS: If you scroll further down, below

25 the three bullet points on the first page, there's a 12:56:17

1 paragraph that begins with, "You can use our services in
2 a variety of ways."

3 Do you see that?

4 Q. BY MR. SCHAPIRO: Yeah.

5 A. That first sentence, "You can use our services 12:56:30
6 in a variety of ways to manage your privacy."

7 Again, the assertion of privacy and the Privacy
8 Policy from Google to its users.

9 The last two sentences of that paragraph, I'd
10 like to read. "You can also choose to browse the web 12:56:51
11 privately using Chrome in incognito mode." You've heard
12 me say that numerous times today.

13 Next sentence, "And across our services, you can
14 adjust your privacy settings to control what we collect
15 and how your information is used." 12:57:10

16 Again, this implies to me that Google is stating
17 that I have control; right? And that any data that I
18 provide to Google, I can -- I would explicitly consent to
19 their collection of that data.

20 They have stated that I can browse privately 12:57:32
21 using Chrome in incognito mode. I've -- I've testified
22 earlier that when I am browsing privately, I never
23 consent to collection.

24 So, again, in the Privacy Policy, I'm taking
25 Google at their words that when I am browsing privately, 12:57:51

1 that is the method by which I notify Google that I do not
2 consent to collection.

3 Q. Are you finished?

4 A. Yes, I'm finished. Thank you.

5 Q. So you have emphasized the use of this word 12:58:24
6 "control"; correct?

7 A. Correct.

8 Q. And so what have you done -- strike that.
9 And it says that -- the Privacy Policy says that
10 you can control -- or that you can -- that they can -- 12:59:00
11 that Google puts you in control. Is that a fair
12 paraphrase of that first sentence that you've cited?

13 A. That's -- yes.

14 Q. So what -- so being in control, what did you do
15 to prevent Google from receiving, let's say, your IP 12:59:27
16 address when you visited a site that ran Google
17 Analytics? How did you exercise that control?

18 A. So the control that I exercised is I used the
19 feature incognito mode in Chrome that they expressly
20 called out in this Privacy Policy as a means for me to 12:59:49
21 privately browse the web.

22 So, again, my control in this situation, the
23 recourse that Google has indicated to me in their own
24 Privacy Policy, that if I want to browse privately and
25 not be observed by Google, is to use Chrome in incognito 13:00:12

1 you believe Google has represented that using incognito
2 mode would prevent Google from receiving user data coming
3 through its services that are installed on third-party
4 websites?

5 MR. LEE: Sorry, Andy, are you referring to 14:11:36
6 Exhibit 10 or the Privacy Policy?

7 MR. SCHAPIRO: Sorry. No. I'm still on
8 Exhibit 10, the Chrome Privacy Notice. Apologies if I
9 misspoke. I think I said --

10 MR. LEE: I just wanted -- 14:11:48

11 MR. SCHAPIRO: Yeah.

12 THE WITNESS: I didn't -- I didn't review the
13 document in that context. Can I review really quickly?

14 Q. BY MR. SCHAPIRO: Sure.

15 A. And again, just to make sure I have the context 14:12:14
16 right, you're asking are there any assertions -- do I
17 perceive there to be any assertions in this Chrome
18 Privacy Notice -- I'm sorry. Could you restate it -- I
19 think it's better if you restate it.

20 Q. BY MR. SCHAPIRO: Yeah. It was a somewhat long, 14:12:32
21 but I think -- but I hope well-crafted question.

22 The question was: Is there anywhere in this

23 crime -- excuse me -- in this Chrome Privacy Notice where

24 you believe Google has represented that using incognito

25 mode would prevent Google from receiving user data coming 14:12:51

1 through its services that are installed on third-party
2 websites?

3 A. Yes, I do, actually. If you take a look at the
4 very first page.

5 Q. Uh-huh. Page 1 or -- 14:13:17

6 A. Yes, sir. Page 1.

7 Q. Uh-huh.

8 A. Paragraph 1, just underneath the archive date,
9 June 21, 2016.

10 Q. Uh-huh. 14:13:30

11 A. The last sentence says, "Although this policy
12 describes features that are specific to Chrome, any
13 personal information that is provided to Google or stored
14 in your Google Account will be used and protected in
15 accordance with Google Privacy Policies." 14:13:48

16 I'll refer back to the Google Privacy Policy
17 that's referenced there where it's stated that I'm in
18 control of the data that is collected, that I can browse
19 the web privately with Chrome in incognito mode, and I
20 can adjust privacy settings to control what is collected 14:14:12
21 and how your information is used.

22 If I never consented to have data collected in
23 private mode, to me this is a direct violation of
24 Google's Privacy Policy, including this one that's been
25 presented. 14:14:32

1 not make this additional carveout.

2 So to me this at best represents an
3 inconsistency of statement of fact from Google. So I'm
4 even more -- to be honest with you, I'm very confused by
5 this inconsistency, because if it was important for us to 14:41:14
6 know that, why was this not disclosed previously?

7 Q. BY MR. SCHAPIRO: And so you're saying you think
8 this would have been important to disclose?

9 A. Yes, I do.

10 Q. Let's take a look at Exhibit 12, please. 14:41:39

11 (Exhibit 12, Search & browse privately -
12 Computer - Google Search Help, marked for
13 identification electronically by counsel.)

14 THE WITNESS: Okay. I have that document.

15 MR. LEE: It's a short document. Do you want to 14:42:27

16 just read it?

17 THE WITNESS: Yeah. Give me just one moment.

18 MR. LEE: By the way, while we're waiting, Andy,

19 before this deposition closes, can you give me the

20 effective date of the last document we looked at, 14:42:57

21 Exhibit 11, please?

22 MR. SCHAPIRO: I will see if I can.

23 THE WITNESS: Okay. I've reviewed the document.

24 Q. BY MR. SCHAPIRO: And do you know if you've seen

25 this document before? 14:43:40

1 A. Yes, I've seen this document before.

2 Q. In what context?

3 A. It was after the case started. I believe I

4 reviewed the search and browse privately help section,

5 and what's caching my eye is their core -- what stands 14:44:01

6 out in memory for this is that I remember them comparing

7 themselves to other private browsing modes with other

8 browsers.

9 Q. In that second sentence there it describes

10 several ways you can browse the web privately; right? It 14:44:30

11 says, "To browse the web privately, you can," and then it

12 lists several things.

13 A. Sorry, can you restate that?

14 Q. Sure.

15 The second sentence says, "To browse the web 14:44:44

16 privately, you can see use private browsing, sign out of

17 your account, change your custom results settings, or

18 delete past activity."

19 And my question was: This sentence says that to

20 browse the web privately, there are several -- there are 14:45:05

21 a number of things you can do; correct?

22 A. Yes. I see that verbiage.

23 Q. And then all of these are things you can do to

24 browse the web privately; correct?

25 A. They may -- they may destroy the information 14:45:23

1 that is in the browser, but if that data was collected
2 upstream by Google or another entity, then that browsing
3 session was not private.

4 Q. And yet this disclosure describes all those
5 things as ways you can browse the web privately, doesn't 14:45:46
6 it?

7 A. It puts that forward, that's right, and I would
8 agree with private browsing, if it's doing what it's
9 supposed to do, signing out of the account, yes. If you
10 were signed in, that activity would be identifiable to 14:46:03
11 you. Not sure what it means about change your custom
12 result settings, and deleting past activity, that's just
13 local. That wouldn't delete any collected data.

14 Q. Well, does this change your view as to whether
15 when Google has used the word -- phrase "browse the web 14:46:19
16 privately," it meant something beyond just deleting
17 local -- or protecting against local retention of data?

18 A. No. I mean, the Google Privacy Policy's still
19 in effect, regardless of what is said on the details of
20 search and browse privately in this document. Again, in 14:46:47
21 Google's Privacy Policy, they say I have the control over
22 my private data, I'm able to browse the web privately in
23 incognito mode, and that I'm in control of what
24 information's collected; right?

25 And if I'm browsing privately and Google in 14:47:13

1 incognito is collecting that information, which it is,
2 then I'm not browsing privately, despite any claims of
3 how to search privately on this document.

4 Q. So is your contention that the phrase "browse
5 the web privately" means one thing in the Privacy Policy 14:47:34
6 and means something else in this other document that you
7 reviewed?

8 A. I could interpret that as true here, because
9 here they're couching do these things to browse
10 privately, whereas in the Google Privacy Policy, it 14:47:50
11 simply states I can browse privately using Chrome in the
12 incognito with no clarification. Moreover, it's --
13 moreover, the Privacy Policy states that I would be in
14 control of what is collected, and, in fact, I'm not when
15 I'm in incognito mode, because Google is collecting it. 14:48:11

16 And if you refer back to our previous
17 conversation about the data that has been collected but
18 is anonymized, the fact that that all was collected and
19 can be associated even once anonymized is a violation of
20 Privacy Policy. 14:48:31

21 Q. Do you believe that everyone would understand
22 the phrase "browse the web privately" the way you
23 interpret browse the web privately?

24 A. Yes. I believe that people would not parse is
25 it just cookies, is it just my browsing history. When 14:48:49

1 people understand private, I would say the vast majority
2 of layman and reasonable people would say, "I am private.
3 I am free from the collection and observation of this
4 data," anonymized or otherwise.

5 Yes. My answer's yes. I believe browsing 14:49:09
6 privately would mean I'm not being observed, and my data
7 is not being collected.

8 Q. And you said whether anonymized or not, and I
9 thought earlier you -- you -- when you were talking about
10 incognito, you were placing an emphasis on what you 14:49:26
11 thought was a lack of anonymity?

12 MR. LEE: Objection to form, mischaracterizes.
13 You can answer.

14 THE WITNESS: I'll state again I think a
15 reasonable person has no concept of anonymization -- you 14:49:37
16 know, anonymized data, because they don't even perceive
17 that the data's being collected, because they perceive
18 that they are being -- that they are able to browse
19 privately in these private browsing modes as they're
20 branded and as the policy states they can control the 14:49:55
21 data when in that mode.

22 Q. BY MR. SCHAPIRO: And you see here in the next
23 paragraph under, "How private browsing works," this
24 document indicates, as I think you pointed out, that
25 private browsing works differently depending on which 14:50:16

1 is 3:05 p.m.

2 Q. BY MR. SCHAPIRO: Mr. Davis, are you aware of
3 ways in which you can sell your personal information?

4 A. Are you talking specifically of my browsing
5 activity? 15:05:06

6 Q. I am.

7 A. Yes. I believe there's several different
8 browsers on the market, like Kylo and Brave, and I think
9 there's a few others, that will compensate you if you
10 choose to share and sell that information. I'm generally 15:05:20
11 aware of it.

12 Q. And approximately when did you first become
13 aware of these websites' practice of paying users a fee
14 for their browsing data?

15 A. I think it was very close to the time that the 15:05:39
16 suit was filed or started. Very close to that time.

17 Q. Have you ever tried to sell any of the
18 information at issue in this lawsuit, like your browsing
19 history, for example?

20 A. I have not, as of yet. 15:05:57

21 Q. And do you have a belief as to how much your
22 personal information is worth?

23 A. Well, I think -- are you asking in --
24 specifically in this case or in general?

25 Q. Well, I'm asking in general, but I'm asking 15:06:14

1 about the type of information that you put at issue in
2 this case.

3 A. I think it's clear that there is some value to
4 all personal data. There's whole marketplaces and the
5 fact that a marketplace is compensating people for it. I 15:06:32
6 haven't really done the analysis to say whether or not
7 those rates that they are providing are fair market or
8 not. I would have to -- to give you a complete answer, I
9 would have to do a lot more analysis and get pretty
10 specific on, like, which data, et cetera. 15:06:50

11 Q. And has the conduct that you're alleging in this
12 lawsuit affected your ability to sell your information in
13 any way?

14 A. Affected my ability to sell my information?
15 Considering I haven't sold my information, I'm not sure 15:07:07
16 I've fully explored that or not. So my answer is I don't
17 know. Because I have not attempted to sell my
18 information, I'm not sure if this has impacted my ability
19 to sell my information or not.

20 Q. Sure. 15:07:27

21 And has the misconduct that you've alleged
22 against Google in any way affected the value of your
23 information?

24 A. Can you restate the question? I'm not sure I
25 follow. 15:07:38

1 Q. Yeah.

2 Well, a moment ago I asked if the misconduct you
3 allege in this case had affected your ability to sell
4 your information. I think you told us earlier that you
5 believe your personal information has value; right? 15:07:49

6 A. (Nods head.)

7 Q. And so do you believe that Google's misconduct
8 has -- alleged misconduct has in any way affected the
9 value of your information?

10 MR. LEE: To Google or to himself, Andy? 15:08:06

11 MR. SCHAPIRO: To anyone in the market.

12 THE WITNESS: I haven't considered that
13 question, so unsure how to answer. I haven't thought
14 through that sufficiently to really give you a good
15 response there. Considering I'm not actively selling my 15:08:24
16 information, it's not something I've really put a lot of
17 thought into.

18 Q. BY MR. SCHAPIRO: As you sit here today, can you
19 tell me all the ways in which you believe you've been
20 harmed by Google? 15:08:42

21 A. Sure. I can say I first would refer to the
22 claims; right? Those claims summarize the harm pretty
23 specifically.

24 I also would say that the violation of privacy
25 has damaged my perception of what a large organization 15:09:03

1 like Google actually did when they told me that they
2 wouldn't, and that has eroded my confidence and trust in
3 that brand, so it has damaged what was otherwise a
4 healthy relationship with that brand. It has impacted
5 that.

15:09:29

6 It has made me more suspect of the claim of
7 in-private browsing in general in the industry, and it's
8 impacted my trust level in what was an otherwise trusted
9 brand in a direct violation of a trust and an agreement
10 that was struck in the contract that we talked about
11 previously, and it's a pretty egregious thing when you
12 think about the potential harm that it could do not just
13 to me but to others in other jurisdictions.

15:09:52

14 The only thing that we ever really truly own is
15 ourselves, and if that property is violated, which are my
16 thoughts, my activities that I say should remain private,
17 and if that's happening hundreds of millions if not
18 billions of times across the globe, it may be happening
19 in jurisdictions where that data could put, potentially,
20 people at harm, then there's a great misjustice that's
21 being done on behalf of Google if it is collecting that
22 information and it is collecting that information in
23 incognito mode.

15:10:13

15:10:37

24 So you asked what the cost to me has been, huge
25 erosion of trust and a huge sense of disappointment that

15:10:55

1 an American company would do such a -- would behave in
2 such an egregious way and run over privacy rights of
3 users, millions and millions of them, in specifically the
4 mode that they present that you can provide privacy. It
5 seems quite egregious to me, but that's been the cost to 15:11:20
6 me.

7 Q. Can you think of anything else?

8 A. I think that summarizes it.

9 Q. Can you think of any specific expense that you
10 have incurred as a result of Google's conduct alleged in 15:11:35
11 this lawsuit?

12 A. Yes. I mean, if these background processes are
13 occurring, there's electricity costs that is required.
14 As those compensational cycles are run and as that
15 data -- excess data is transmitted back to Google, 15:11:54
16 there's a financial cost on the infrastructure side.

17 Q. So you're saying you believe that there is some
18 measurable increase in your electricity usage because
19 there might be a -- a get request or a post request? Is
20 that your statement? 15:12:22

21 A. Your question wasn't whether it was measurable.
22 You asked if there was a cost associated, and I replied
23 that yes there is a cost associated with the extra work
24 that the computer is doing while that data is being
25 collected. 15:12:39

1 Q. And what's your basis for saying your computer's
2 doing extra work when the actions that you allege in the
3 complaint took place?

4 A. Yeah, I can tell you the technical side of it.

5 On the hardware side, your CPU is controlled by the 15:12:55

6 amount of voltage that goes through it, and so as it

7 processes more information, it actually ramps up the

8 voltage, which is the electricity that it's using, and so

9 if in the background all of this data is being collected

10 when it shouldn't be, there is a measurable increase in 15:13:11

11 the amount of electricity consumed for those operations.

12 Does that answer the question?

13 Q. Yeah, you said there's a measurable increase. I
14 assume you've never measured it?

15 A. No. Actually, you can actually see the voltage 15:13:28

16 in the performance monitor on computers. In the specific

17 case of incognito, I haven't gone and measured what is it

18 doing in incognito mode. I'm just saying in general, as

19 computer hardware works, the harder the CPU works, the

20 more power is consumed. 15:13:52

21 Q. Do you have any idea whether being incognito

22 takes up more energy or less energy than operating in

23 normal mode?

24 A. I haven't done that specific comparison.

25 Q. Other than what you say is an electricity cost, 15:14:19

1 can you think of any other expense that you have incurred
2 as a result of Google's alleged misconduct?

3 A. Well, if I didn't consent to the collection of
4 the data and if in any way they have enhanced their
5 products or services off of data that I didn't consent to 15:14:47
6 be collected, then there has been some gain in a way for
7 Google that if they collected that information, it was
8 collected in a non-consenting way.

9 So I guess hypothetically there could be a
10 potential cost put to that of what that -- what that 15:15:13
11 information -- my private browsing information is worth,
12 which might be a different price point than knowingly
13 disclosed browsing information in normal mode. I could
14 see -- I could see that as being one line of -- one line
15 of evaluation of cost. 15:15:34

16 Q. Anything else?

17 A. No, nothing else comes to mind to me at the
18 moment.

19 Q. Do you currently use your -- strike that.

20 How many Gmail accounts do you have? 15:16:06

21 MR. LEE: Objection. Asked and answered.

22 Q. BY MR. SCHAPIRO: I forgot the answer.

23 A. That's okay. I only have the one.

24 Q. And do you currently use your Gmail account?

25 A. Not as my primary. I use it for -- only if I'm 15:16:20

1 do that. Okay?

2 THE WITNESS: All right.

3 MR. LEE: Go ahead.

4 Q. BY MR. SCHAPIRO: What is fingerprint data?

5 A. Yeah. I would consider fingerprint data to be 15:46:22
6 any unique identifier that the browser could pass that
7 would identify a particular device or particular browser
8 serialization or session associated with any activity
9 that I'm doing during incognito mode.

10 Q. Did you say "serialization"? 15:47:09

11 A. Yeah. It's basically like a unique identifier,
12 if any unique identifier is provided for that browser or
13 device. It could also include things like IP, but I
14 don't want to blend those two topics; right?

15 Q. Do you recall during this litigation -- you 15:47:47
16 can -- you don't need to keep this document up if you
17 don't want to.

18 Do you recall providing Google with cookie
19 values from your browser during this litigation?

20 A. I know that there was data collected after 15:48:04
21 browser sessions, and I believe that data was shared as
22 part of discovery.

23 Q. And do you know how the cookies -- those cookies
24 were collected?

25 A. I believe there was a forensics process that was 15:48:21

1 employed to trace custody of that data sample and provide
2 it.

3 Q. Do you know from what devices that data was
4 collected?

5 A. I think it's all part of the official record. I 15:48:41
6 don't recall the device names. I know I had, I believe,
7 an iPhone and some laptops that were -- and a desktop
8 that were -- that were imaged and that data provided.

9 Q. And were you browsing in incognito mode when
10 these cookies were collected? 15:49:08

11 A. Yes.

12 Q. And did you sign in to your Google account when
13 these cookies were collected?

14 A. The normal browsing activity, as we've talked
15 about in my testimony, is by default in incognito. I 15:49:25
16 cannot recall if I was asked to provide samples of both,
17 so I don't know if I can accurately answer the question.
18 I don't recall whether it was log in and let's see that
19 data and then let's only do incognito. I can't recall if
20 we covered both cases or just incognito. 15:49:45

21 MR. LEE: Right. And Mr. Schapiro's asking
22 about actions you took, but I just want to -- you're
23 okay, but just be careful about revealing any
24 communications or things people said to you.

25 THE WITNESS: Understood. 15:49:57

1 but, no, I know it existed at least -- I think I've been
2 told at least in 2020, but I don't know exact dates.

3 MR. LEE: Okay. All right. Thanks.

4

5 EXAMINATION

16:15:19

6 BY MR. LEE:

7 Q. Mr. Davis, my name is James Lee, and I represent
8 the plaintiffs. I know it's been a long day. We'll try
9 to get you out of here really soon. Okay?

10 A. Okay.

16:15:37

11 Q. I want to -- I want you to -- I want to focus my
12 first question on the incognito splash screen that you've
13 discussed several times today. Okay?

14 Now, when you read the incognito splash screen,

15 does it convey to you that Google will collect your data

16:15:59

16 while you're in incognito mode?

17 A. No, it doesn't.

18 Q. And why doesn't it convey -- what makes you

19 believe it does not convey to you that Google will

20 collect your data while you're in incognito mode?

16:16:18

21 MR. SCHAPIRO: Objection to the form of the

22 question.

23 THE WITNESS: To respond the -- number one,

24 Google is never mentioned on the page anywhere; right?

25 Also, just kind of go through what is on the page, at the

16:16:35

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1 very top we talked about the fact that the very first
2 thing you see is that unidentifiable persona. This in
3 part says that, you know, these activities are hard or
4 impossible to observe.

5 Incognito, we talked about the definition of 16:16:59
6 that, which is unidentifiable, private. I'm told in the
7 first sentence that I can browse privately, and so I'm
8 assuming when we say private, relative to that and
9 understanding the Privacy Policy, this also implies
10 privacy from Google. 16:17:22

11 Q. BY MR. LEE: Okay. Thank you.

12 And when you read the splash screen in
13 conjunction with the Privacy Policy, what does it tell
14 you about what -- whether Google will collect user data
15 or information in incognito or private browsing mode? 16:17:39

16 A. Yeah, if I take the totality of the splash
17 screen, the reference to the privacy and personal
18 information section that refers to the Google Privacy
19 Policy and the Google Terms of Service and the Google
20 Privacy Policy itself. It states that I, the user, am in 16:17:58
21 control of my data, that I can use Chrome to browse the
22 web privately in incognito mode and that I am in control
23 of what Google collects, what information it collects.

24 And we talked a lot about those data that are
25 considered private, and I would reiterate that when I 16:18:29

1 initiate an incognito mode, I am following the guidance
2 from the Google Privacy Policy. This states my recourse
3 for privacy when using Chrome is to use incognito mode,
4 and that's -- I'm -- had every reason to assume and trust
5 that my information would not be collected when using 16:18:51
6 incognito mode.

7 Q. Do you think there's anything -- any ambiguity
8 about that when you look at the Privacy Policy and the
9 incognito splash screen together?

10 A. No -- 16:19:05

11 MR. SCHAPIRO: Objection. Calls for a legal
12 conclusion.

13 THE WITNESS: My answer is no. I don't have any
14 ambiguity on that fact.

15 Q. BY MR. LEE: Okay. Go ahead. Sorry. 16:19:18

16 A. That's my statement.

17 Q. Okay. Thank you, Mr. Davis.

18 The concept of identity has come up a few times
19 today, so I want to ask you a few questions about that.

20 Okay? Will that be all right? 16:19:31

21 A. That's fine.

22 Q. Okay. When it comes to your understanding of
23 this case, is identity just your name or your email
24 address on your Google account, or is it something else?

25 A. So my response would be that identity is more 16:19:50

1 A. No, I don't see that language.

2 Q. Do you recall that counsel for Google asked you
3 a hypothetical -- strike that.

4 Do you recall Google's counsel represented to
5 you that there were analytic services that -- that 16:24:25
6 websites use outside of Google Analytics or any other
7 Google service?

8 A. I recall that line of questioning.

9 Q. Okay. In this bullet that refers to "websites
10 you visit, including the ads and resources used on those 16:24:45
11 sites," could that also apply to non-Google Analytics
12 services?

13 A. I would assume that it has to, because it
14 doesn't call on Google specifically.

15 Q. Now, if you read this document or any iteration 16:24:59
16 of this document and try to make it consistent with the
17 Terms of Service, the Privacy Policy and the Google --
18 I'm sorry -- the incognito splash screen, what would you
19 understand Google to be saying about what it will collect
20 in incognito mode? 16:25:24

21 MR. SCHAPIRO: Objection to the form of the
22 question.

23 THE WITNESS: Yeah. Taken in its totality,
24 again, I don't see anywhere here related to Google
25 Analytics or other activities that would constitute my 16:25:41

1 consent for private web activity to be collected while in
2 incognito mode.

3 Q. BY MR. LEE: Based on these disclosures and what
4 you've learned about this case, do you think Google has
5 been honest with users about its data collection 16:26:07
6 practices with respect to incognito mode and private
7 browsing mode?

8 MR. SCHAPIRO: Objection to the form of the
9 question.

10 THE WITNESS: My answer is no. I don't think 16:26:19
11 they've been honest with what's happening. Again, just
12 to reiterate, on the Google Analytics question, its own
13 help file refers to the fact that it will adhere to --
14 when they use Google Analytics, that it will adhere to
15 the Google Privacy Policy. 16:26:44

16 That same Google Privacy Policy is referenced in
17 the Terms of Service, and it states that users are in
18 control of the data that is collected and that if you
19 want to browse privately, you must do that through Google
20 incognito mode. That's the one that's described in the 16:27:10
21 Google Privacy Policy, and we can control what is
22 collected by Google and how that information's used.

23 And so the challenge I have with this whole
24 situation is when and where, when using incognito mode,
25 was I granted the control or ability to filter that data 16:27:32

1 and to prevent that private data from going to Google?

2 In fact, I never was; right?

3 I have -- it's been stated that I have that

4 control, but in actuality, Google still collects that

5 information even though the recourse they provided to me 16:27:55

6 was presented as a satisfactory way to browse privately

7 in incognito mode.

8 Q. BY MR. LEE: Now, you talked about how the

9 Privacy Policy states that users can control what Google

10 collects. Do you remember that? 16:28:25

11 A. I remember that.

12 Q. Okay. And does Google say in its Privacy Policy

13 whether it's limited to a single Google service or just

14 Google Analytics or does it say something more broad?

15 A. So the words actually say "across our services," 16:28:42

16 and I don't see carveouts for specific services in that

17 statement.

18 Q. So when you enable incognito mode, do you

19 understand that to work across all of Google services?

20 A. I do. 16:29:00

21 MR. SCHAPIRO: Objection. Leading.

22 THE WITNESS: I do.

23 MR. LEE: Thank you, Mr. Davis. I don't have

24 any further questions.

25 MR. SCHAPIRO: Nothing from me. Thank you for 16:29:09